COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2278

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MARY MCKNIGHT,

PETITIONER-APPELLANT,

V.

TEACHERS RETIREMENT BOARD OF WISCONSIN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Vergeront, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Mary McKnight appeals from an order affirming the decision of the Teachers Retirement Board of Wisconsin (the Board) that McKnight did not qualify for a disability annuity under WIS. STAT. § 40.63 (1997-

98).[1] The issue before us is whether a certification by McKnight's former employer that her termination was for a reason other than disability was "reasonable and correct" within the meaning of WIS. ADMIN. CODE § ETF 11.12(1)(d)1. We conclude that the Board properly determined there was substantial evidence in the record to support the employer's determination and therefore affirm.

BACKGROUND

¶2 McKnight became a participant in the Wisconsin Retirement System (WRS) in 1979. She was hired as an Assistant Professor of Agricultural Industries at the University of Wisconsin-Platteville beginning in 1989. Her letter of appointment specified that her continued employment was conditioned upon the completion of her Ph.D. by the end of the 1990-91 academic year. The University subsequently extended the time for McKnight to complete her degree until May of 1992, but informed her that her contract would not be renewed beyond the 1993-94 academic year if she had not earned her degree by the extended deadline.

¶3 In the fall of 1991, McKnight requested an educational leave of absence in order to complete her Ph.D., citing her demanding teaching schedule and an injury she had suffered in 1989. The University granted McKnight a leave of absence for the spring of 1992 to allow her to complete her dissertation. Still, McKnight failed to complete her degree work by the specified time. The University informed McKnight by letter dated April 28, 1993, that her employment would be terminated on May 21, 1994. She stopped working on

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

May 6, 1994, and was deemed disabled for the purpose of Social Security disability benefits as of May 9, 1994, but was paid by the University until the official date of her termination, May 21, 1994.

¶4 McKnight applied for WRS disability benefits in October of 1995. She submitted certifications from two physicians stating that she was unable to engage in gainful activity due to chronic fatigue syndrome and fibromyalgia. The Department of Employee Trust Funds (DETF) denied McKnight's disability benefit application in March of 1996 based on the University's certification that McKnight's employment had been terminated for reasons other than disability. McKnight appealed the disability benefit denial to a DETF hearing examiner, who proposed affirming DETF's denial of benefits. The Board adopted the hearing examiner's decision with a few minor additions. It determined that the University's certification of the reason for McKnight's employment was "reasonable and correct," and thus affirmed the denial of benefits. The trial court affirmed the Board's determination on certiorari review under WIS. STAT. § 40.08(12), and McKnight appeals.

STANDARD OF REVIEW

¶5 Our certiorari review is limited to determining: (1) whether the Board stayed within its jurisdiction, (2) whether it acted according to law, (3) whether its action was arbitrary, oppressive or unreasonable, representing its will rather than its judgment, and (4) whether the evidence was such that the Board might reasonably make the order or determination in question. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). The facts found by the Board are conclusive if they are supported by "any reasonable view" of the evidence. ***Id***. (citations omitted). Additionally, we will accord great

deference to the Board's legal interpretation of the eligibility requirements for a disability benefit under the WRS because the legislature has charged the Board with administering the relevant statutes. *See* ***State ex rel. Bliss v. Wisconsin Ret. Bd.***, 216 Wis. 2d 223, 232-33, 576 N.W.2d 76 (Ct. App. 1998).

ANALYSIS

¶6 A WRS participant who becomes "unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment" prior to his or her normal retirement date may be entitled to a disability annuity. WIS. STAT. § 40.63(1)(b). In order to establish eligibility for the disability benefit, a WRS participant must meet certain creditable service requirements and must obtain certification of the disabling condition from two physicians. WIS. STAT. § 40.63(1)(a) and (d). The participant must also show that he or she

> is not entitled to any earnings from the employer and the employer has certified that it has paid to the employe all earnings to which the employe is entitled, that the employe is on a leave of absence and is not expected to resume active service, or that the employe's participating employment has been terminated, because of a disability ….

WIS. STAT. § 40.63(1)(c). An employer's certification that a termination was not due to a disability is fatal to a disability benefit application. ***Bliss***, 216 Wis. 2d at 238. When a denial of benefits is based solely on the employer's negative certification, the Board must make a finding as to whether there was substantial evidence to support the employer's determination that the termination was not due to a disability. ***Id***. at 239-40. The determination should be upheld so long as reasonable minds could reach the same conclusion. ***Id***.

¶7 McKnight contends that the University should have certified either that she was on a leave of absence due to a disability at the time of her termination or that she was terminated due to a disability. Her argument of having been on a leave of absence due to a disability is misplaced because it fails to recognize the relevance of verb tense in the statute. The statute refers to a certification by the employer that an employee "is" on a leave of absence from which she is not expected to return or "has been" terminated from her employment due to a disability. This distinction in verb tense is purposeful, and plainly sets forth two points in time at which the Board certification may occur: while an employee is on leave status, or after the employee has been terminated. In other words, the statute requires the employer to certify the employee's status *at the time of the certification*. *See generally* ***Bliss***, 216 Wis. 2d at 233-38.

¶8 McKnight was not on a leave of absence at the time of the certification;[2] her employment had already been terminated well before then. Therefore, the record plainly supports the employer's refusal to certify that she was on a leave of absence due to a disability. The remaining question is whether the employer reasonably and correctly determined that her employment had not been terminated due to a disability.

¶9 To support her contention that her termination was the result of a disability, McKnight points to the leave of absence which she took in 1992, the

[2] For that matter, the record does not support McKnight's assertion that she was on a leave of absence immediately prior to her termination. The record, at best, reveals that a leave was discussed, not granted. Moreover, WIS. STAT. § 40.02(40) defines a "leave of absence" as a period during which an employee has ceased to render services and "ceased to … receive earnings" without a formal termination of the employment relationship. It is undisputed that McKnight received wages up until her termination date of May 21, 1994. Therefore, she was not on a leave of absence within the meaning of the statute.

certifications by two doctors that she suffers from chronic fatigue syndrome, the fact that she stopped working prior to her termination date, and her own testimony and that of her husband that she was unable to complete her degree due to fatigue. However, it is not our function to consider whether there might have been evidence from which the employer could have concluded that the termination was related to a disability. Rather, our standard of review requires us to consider only whether there was sufficient evidence for the Board to find that the employer could reasonably have determined that the termination was not the result of a disability. We are satisfied that there was.

¶10 First, the Board was not required to accept at face value the testimony of McKnight or that of her husband regarding the reason McKnight failed to complete her degree. It may be inferred from the hearing examiner's proposed finding that he assigned little credibility to the McKnights' testimony and that he found insufficient credible evidence to support McKnight's allegation that physical and mental problems prevented her from completing her degree. The Board was entitled to rely upon the DETF hearing examiner's implied credibility determination because the hearing examiner was in the best position to assess the witnesses' demeanor and to weigh any potential bias or interest the witnesses might have in the outcome. *See* WIS. STAT. § 227.45(1) (an administrative hearing examiner is to apply "[b]asic principles of relevancy, materiality and probative force"); WIS JI—CIVIL 215 (for a general explanation of the basic principles relating to credibility); *see also* ***Pieper Elec., Inc. v. LIRC***, 118 Wis. 2d 92, 97-98, 346 N.W.2d 464 (Ct. App. 1984) (requiring an administrative agency to consider the examiner's personal impressions regarding witness credibility before making materially different findings of fact).

¶11 There was evidence that McKnight's 1992 leave of absence was classified as educational, rather than medical, in nature. While McKnight had complained of continuing pain from an ankle injury suffered in 1989, there was no showing that she sought medical attention for fatigue prior to the date her degree work was supposed to have been finished. The doctors' certifications and other medical records did not specify when McKnight's condition became disabling. Moreover, despite her claims of fatigue, it was undisputed that McKnight was able to fulfill her other teaching duties, both before and after the leave of absence. Reasonable minds could therefore reach the conclusion that McKnight's failure to complete her degree work by May of 1992 was not attributable to her later-diagnosed conditions.

¶12 McKnight contends that, even if the University's initial termination decision was based on her failure to complete her degree and that failure was non-disability related, the subsequent onset of a disability should be deemed to be the actual cause of her termination. She relies upon ***Fedyn v. City of Superior Fire Dep't***, WC Claim No. 85-24139 (LIRC, May 20, 1988), to support her contention. In ***Fedyn***, a firefighter who had given notice of his intent to take early retirement became partially disabled due to a work-related injury prior to his actual retirement. It was determined that the firefighter retired because of his disability, notwithstanding his previously announced intention to retire for another reason. ***Fedyn*** is readily distinguishable from the present case, however, because it was up to the firefighter to decide whether and why to retire. Here, McKnight did not choose to terminate her employment. Therefore, any intervening disability could not have changed the reason for her decision.

¶13 We conclude that the Board properly accepted the employer's certification that McKnight was terminated for a reason other than a disability, and properly denied her disability benefits on the basis of the negative certification.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).